No. 84686-3
(Consolidated with No. 85012-7)

SUPREME COURT OF THE STATE OF WASHINGTON

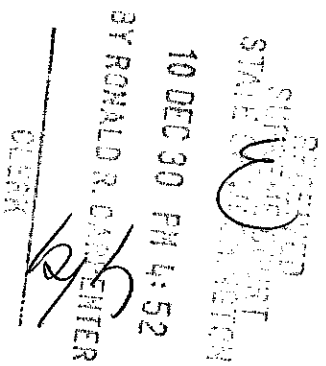
OLGA MATSYUK, individually,
and on behalf of all those similarly situated,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.



PETITIONER OLGA MATSYUK'S
SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. IDENTITY OF PETITIONER

The Petitioner is Olga Matsyuk, Appellant in the Court of Appeals and plaintiff and proposed class action representative in the Superior Court. Ms. Matsyuk submits the following in supplement to the briefing already filed in this matter.

II. INTRODUCTION AND SUMMARY OF ARGUMENTS

The Court of Appeals opinion contains several fundamental errors.[1] One is that the Court of Appeals gave scant consideration to the "make whole" doctrine. In numerous cases Washington has identified the doctrine – seeing that injured persons are fully compensated for their losses whenever possible – as an important, nearly paramount, public policy. Here, Ms. Matsyuk has failed to receive full compensation for her personal injury loss. The reason is that Matsyuk's PIP insurer recovered the PIP payments it had previously made for her, but did not contribute its fair share to the costs Matsyuk incurred to make that recovery possible. The opinion below gave little consideration to the make whole doctrine and the public policy concerns that underlie it, however, and the result it

[1] *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 229 P.3d 893 (2010). The Division II opinion issued in *Weismann v. Safeco Ins. Co. of Illinois*, 157 Wn. App. 168, 236 P.3d 240 (2010), contains much of the same erroneous reasoning, and ultimately the same erroneous holding, as the *Matsyuk* opinion. *See, e.g., Weismann*, 157 Wn. App. at 173 n.3. For that reason, the arguments asserted herein on the errors of *Matsyuk* apply, for the most part, equally to the *Weismann* opinion.

reaches runs directly contrary to the doctrine.

Second, the Court of Appeals opinion runs contrary to the teaching of *Hamm v. State Farm Mutual Automobile Insurance Company*, 151 Wn.2d 303, 88 P.3d 395 (2004). In the opinion below, the Court of Appeals views State Farm as a single entity that simply provided multiple coverages for the at-fault driver, Mr. Stremditskyy. As a consequence, the analysis approaches the issues from the perspective of State Farm solely as Stremditskyy's insurer. The Court fails to consider the wholly separate rights, obligations and limitations held by or imposed upon State Farm as the PIP insurer to Ms. Matsyuk.

Third, on the breach of contract claim, the Court of Appeals violated black letter insurance law by failing to construe the language of the State Farm policy in favor of Ms. Matsyuk, as the insured. In fact, the Court of Appeals' approach on the issue impermissibly favors the insurer's perspective. Furthermore, the non-duplication of benefits upon which the Court relies in this part of its analysis is demonstrably inapplicable to this case.

On Matsyuk's bad faith claim, the Court of Appeals either misapprehended the nature of the claim, misapplied the applicable law, or both. In essence, the Court of Appeals held that a bad faith claim was not viable because it determined that, ultimately, State Farm was not required

to pay a portion of the plaintiff's attorneys fee as Matsyuk had asserted. This is at odds with previous bad faith jurisprudence, however, where the inquiry goes to the insurer's conduct notwithstanding whether its position is ultimately found to be correct.

For these reasons and the other reasons discussed in this and prior briefing, this Court should reverse and remand to the trial court with the direction to enter partial summary judgment in favor of Matsyuk.

III. SUMMARY OF FACTS[2]

One particularly important, uncontested fact is that Ms. Matsyuk is a State Farm insured. Specifically, a PIP insured. CP 4. Thus, Ms. Matsyuk had a direct relationship with State Farm for purposes of the PIP, and possessed all of the rights and entitlements as a State Farm insured without regard to or need for anyone else. CP 4. State Farm, in fact, paid Matsyuk's medical bills under the PIP coverage. The PIP payments were made as a result of the obligations State Farm owed directly to Matsyuk as its insured. The payments were not made on behalf of anyone else, or as a result of an obligation owed to anyone other than Matsyuk. CP 4, 5, 8.

Matsyuk later sought a liability recovery from Mr. Stremditskyy as

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[2] It is worth noting that for purposes of State Farm's motion to dismiss, all facts pled and hypothetical facts reasonably inferred must be construed in favor of Ms. Matsyuk. *See, e.g., Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)); *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

the at-fault party. In its capacity as Mr. Stremditskyy's liability insurer, State Farm agreed to pay a liability settlement on his behalf. CP 4, 5. When it made the liability settlement payment to Matsyuk on behalf of Mr. Stremditskyy, State Farm deducted the PIP payments it had already made to Matsyuk in its capacity as her PIP insurer. CP 4, 5.

The State Farm policy provided the following right to seek reimbursement from its PIP insureds, such as Matsyuk, for PIP payments previously made:[3]

> (2) If ***we*** make payment under this policy and the ***person*** to or for whom ***we*** make payment recovers or has recovered from another party, then that ***person*** must:
>
> (a) hold in trust for ***us*** the proceeds of any recovery; and
>
> (b) reimburse ***us*** to the extent of ***our*** payment.

CP 122 (Policy, General Terms Section, at 42) (emphasis in original). The State Farm policy further provided the following explicit limitation on its right to seek reimbursement of PIP:

> ***Our*** right to recover ***our*** payments applies only after the ***insured*** has been fully compensated for the ***bodily injury***, ***property damage***, or ***loss***.

CP 122 (Policy, General Terms Section, at 42) (emphasis in original).

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[3] Inexplicably, the Court of Appeals stated that State Farm did not possess the right to seek reimbursement of PIP payments from Matsyuk. *See Matsyuk*, 155 Wn. App. at 333. As the above quoted section demonstrates, this is plainly incorrect.

IV. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals Failed to Give Appropriate Weight to the Make Whole Doctrine And The Public Policy That Underlies It

The principle that an insurer should shoulder its fair portion of the legal expense its insured incurs to make a third party recovery, when both the insurer and the insured will benefit from that recovery, is of course grounded on the common fund rule. But before one gets to that point, there is first the question of whether an insurer even has the right to benefit in the insured's third party recovery by seeking reimbursement of its payments, and any concomitant limitations on that right. This is where the make whole doctrine comes into play.

That the make whole doctrine is the manifestation of Washington's strong public policy of favoring the full compensation of the innocent victims of accidents. *E.g., Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978). The doctrine is such an important expression of Washington public policy that this Court has, for example, clarified that "innocent" does not mean "without fault," and even a negligent person is entitled to the benefit of the make whole doctrine. *See Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 621, 160 P.3d 31 (2007).

Because the doctrine is so firmly established, a lengthy discussion of it is unnecessary and would not be particularly useful. For purposes of this case, however, it is important is to recognize two things. One is that, notwithstanding the importance of the make whole doctrine and its equally important underlying public policy implications, the Court of Appeals gave it little consideration.

The other is that when the issue concerns the interest of an insured in receiving full compensation, compared to an insurer's interest in recouping its insurance payments, the make whole doctrine expresses a clear preference for the insured who has not been made whole. This is because an insurer's right to seek reimbursement is, in the first instance, altogether contingent on its insured being made whole. *E.g., Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 310-11, 88 P.3d 395 (2004); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 878-79, 882-83, 31 P.3d 1164 (2001); *Mahler v. Szucs*, 135 Wn.2d 398, 418, 436, 957 P.2d 632 (1998). *See also Thiringer*, 91 Wn.2d at 219-220 (insured's right to receive full compensation is superior to the insurer's right to recover its payments).

In short, in accordance with and pursuant to the make whole doctrine, the equities in this case strongly favor the PIP insured, Ms. Matsyuk. The opinion below erred in failing to recognize this fact.

B. The Court of Appeals Opinion, And Its Reliance On *Young v. Teti*, Is Contrary To *Hamm*

The Court of Appeals opinion runs contrary to the teaching of *Hamm v. State Farm Mutual Automobile Insurance Company*, 151 Wn.2d 303, 88 P.3d 395 (2004). Specifically, although State Farm provided distinct, multiple coverages for the underlying motor vehicle accident, the Court of Appeals views State Farm as a single entity. Worse, the Court of Appeals viewed all of those coverages as being provided on behalf of the at-fault driver, Mr. Stremditskyy. The end result is an analysis that approaches the issues from the perspective of State Farm solely as Stremditskyy's insurer, and does not evaluate the wholly separate rights and obligations of State Farm as Ms. Matsyuk's PIP insurer.

In the first instance, the Court of Appeals approach does not comport with reality. When State Farm made the PIP payments to Matsyuk, it did not do so as Stremditskyy's liability insurer. It did not make the payments on behalf of Stremditskyy, or because it was obligated to Stremditskyy to make the payments to Matsyuk. Rather, State Farm made the PIP payments to Ms. Matsyuk because it was obligated *to Matsyuk* to do so.

More importantly, the approach runs afoul of *Hamm's* teaching that the rights and obligations of a single insurer that nevertheless provides

distinct, multiple coverages for a single incident must be evaluated separately for each capacity in which the insurer acts. Here, for example, *Hamm* demands that State Farm's rights and obligations must be evaluated not solely in its capacity as Stremditskyy's liability insurer, but also in its separate and independent capacity as Matsyuk's PIP insurer.

The failure of the Court of Appeals in this regard essentially destined the Court to reach not only an erroneous result, but a result that is entirely incompatible with *Hamm*. Similarly, the Court of Appeals' reliance on *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), was erroneous. In sum, *Hamm's* detailed analysis of how the rights and obligations of a single insurer providing multiple coverages must be evaluated cannot be squared with *Young's* polar opposite analysis. This has been previously briefed in detail. *See* Matsyuk's Brief of Appellant, at 20-24.

C. The Court of Appeals Analysis On Matsyuk's Breach Of Contract Claim Is Erroneous

The Court of Appeals failed to construe the insurance policy language at issue in favor of Ms. Matsyuk, as is required under well established Washington precedent. *E.g., Barney v. Safeco Ins. Co.*, 73 Wn. App. 426, 429, 869 P.2d 1093 (1994); *Mercer Place Condo. v. State Farm*, 104 Wn. App. 597, 602-03, 17 P.3d 626 (2000). In fact, the Court's

analysis reflects insurance policy language and provisions being resolved in favor of the insurer. For example, the Court of Appeals states that State Farm was not "recovering" its PIP payments because the mechanism employed was a non-duplication of benefits clause – but this an argument that State Farm did not even make.[4]

Regardless, even if State Farm had asserted a non-duplication argument, it fails for two reasons. One is that *Hamm* teaches that the mechanism employed by an insurer to recoup its payments (*e.g.*, set-off, offset, reimbursement) does not change the fact that it is recouping its payments, and cannot be used to avoid legal expense sharing. *See Hamm*, 151 Wn.2d at 311 n.4.

The other, and completely dispositive fact, is that there is no non-duplication provision in the State Farm policy that applies to this case. The provision relied on by the Court of Appeals, for example, is plainly not applicable to a PIP insured such as Matsyuk. On its face, the provision cited only applies to a liability insured (such as, in this case, Stremditskyy). *See Matsyuk*, 155 Wn. App. at 333 n.7.[5] An altogether

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[4] State Farm's arguments are based on two grounds: the collateral source rule and principles of subrogation. Neither are applicable here, where the issues involve the PIP insured – PIP insurer relationship, and the PIP insurer's right of reimbursement from its PIP insured in connection with that relationship.

[5] Quoting language from the Policy at 7 (CP 87).

different non-duplication provision is generally applicable to PIP insureds such as Matsyuk.

Even so, the language of the provision renders it inapplicable here under the facts presented. It provides that State Farm will not provide PIP benefits if the PIP insured has *already received payment under liability coverage* for the same damages as covered by the PIP.[6] That plainly did not occur here, as the PIP benefits were paid before Matsyuk made the liability recovery. *See generally* Matsyuk's Petition for Review, at 19-20.

The foregoing errors likely diverted the Court of Appeals from actually considering and analyzing the language of the policy's "make whole" provision. This provision specifically provided that State Farm's "right to recover [its] payments applies only after the insured has been fully compensated ...." On its face, this provision clearly provides for the "make whole" rights Matsyuk has asserted,[7] independent of any rule of common law.

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[6] *See* Policy at 13 (CP 93).

[7] To the extent the provision is not entirely clear, it would nonetheless have to be construed in Matsyuk's favor.

D. The Court of Appeals Erred On Matsyuk's Bad Faith Claim

After holding that State Farm was not required to bear a portion of the plaintiff's legal expense as Matsyuk had asserted, the Court of Appeals determined that Matsyuk's bad faith claim was thereby not viable as a result. This holding both misconstrues the nature of the conduct underlying the bad faith claim, and is contrary to the legal standards for actionable bad faith.

As stated in Matsyuk's previous briefing, her bad faith claim does not turn on whether Matsyuk or State Farm is ultimately correct on the legal expense sharing issue. Stated another way, the bad faith asserted was not solely based on State Farm's non-payment of so-called "*Mahler*" fees.[8] Rather, the Complaint alleged that State Farm acted wrongfully when it used its position as holder of the liability settlement money to try to get Matsyuk to release a putative claim she possessed against State Farm as her PIP insurer. This claim – that she was entitled to have State Farm pay *Mahler* fees – had nothing to do with the liability settlement with Stremditskyy. Yet, according to the allegations in the Complaint, State Farm held up the liability settlement in an effort to extract a further

[8] Although the non-payment could provide another basis for the allegations of bad faith.

benefit for itself from its PIP insured.[9] Under the facts as pled, whether Matsyuk ultimately prevails on the legal expense sharing assertion is irrelevant to the question of whether State Farm breached its duty to treat her in good faith and deal with her fairly as its PIP insured.

Instead of simply stating that the bad faith claim was not viable once it held that State Farm was not liable for legal expense sharing, the Court of Appeals should have evaluated whether a bad faith claim was stated nonetheless. Specifically, it should have looked at the allegations of State Farm conduct in its dealings with Matsyuk, and with consideration of the heightened duty of good faith it owed to her as an insured. Because of the heightened duty it owed to Matsyuk, using its position as holder of the liability settlement money to get Matsyuk to release unrelated claims against State Farm as her PIP insurer states a claim for bad faith. Moreover, that State Farm relented after being sued changes nothing, as the damage had already been done, including, *inter alia*, the loss of use of the funds for a period of time.

[9] State Farm's conduct in this regard certainly posed no benefit for Mr. Stremditskyy. In fact, to the extent it jeopardized the settlement, and to the extent it unnecessarily left Mr. Stremditskyy's liability unresolved for a period of time, it was to his detriment.

V. CONCLUSION

The Court of Appeals opinion rests on the pretense that the PIP payments came from Stremditskyy. They did not. Stremditskyy did not make the PIP payments, had no obligation to make any such payments, and the payments were not made on his behalf. The PIP payments were made by State Farm to Matsyuk because State Farm was directly obligated to Matsyuk for them. Under the facts here, if State Farm had not made the PIP payments, Matsyuk would have had the right to pursue them – not Stremditskyy.

State Farm made two primary arguments to support the dismissal of Ms. Matsyuk's claims: the collateral source rule and principles of subrogation. As discussed, neither of these arguments have any applicability or merit here. The collateral source rule is inapplicable because this action is not between the tortfeasor and the injured person; this action involves the rights and obligations of a PIP insurer vis-à-vis its PIP insured. The at-fault driver/tortfeasor, Mr. Stremditskyy, is not, and could not be, a party to this action.

Issues or principles of subrogation likewise have no applicability. Because the relationship here is between the PIP insured and her PIP insurer, the pertinent mechanism is the PIP insurer's right to seek reimbursement from its PIP insured of the PIP payments it made for her.

This is the mechanism that prevents a PIP insured from receiving a double recovery at the expense of the PIP. Not only do principles of subrogation have no place here on the facts, the reality is that the insurer's right to seek reimbursement would in any event render them superfluous to achieving a result that is just and equitable to both PIP insured and PIP insurer.

At bottom, the efforts of Ms. Matsyuk, through her attorney, effected a recovery of funds from the at-fault party, Mr. Stremditskyy. From these funds, Ms. Matsyuk's PIP insurer recovered the PIP payments it had previously made to her. The specific mechanism her PIP insurer employed to effect the recovery (*e.g.*, set-off, offset, reimbursement) is of no importance. Because her PIP insurer benefited from the funds Matsyuk recovered, however, it is liable to bear it fair portion of her legal expense. Any other result is inequitable, as Matsyuk's PIP insurer unfairly benefits from the common fund Matsyuk created, and also results in Matsyuk being left with less than full compensation for her loss.

This Court should reverse the order of dismissal, and remand to the trial court with directions to enter partial summary judgment in favor of Ms. Matsyuk, and for other proceedings consistent with this Court's opinion.

December 30, 2010.

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DECLARATION OF SERVICE

I certify that on December 30, 2010, I caused to be filed with the Court, via email, the foregoing Petitioner Olga Matsyuk's Supplemental Brief, and caused to be delivered, via email, U.S. Mail or both, a true and accurate copy to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington, this 30th day of December, 2010.

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